

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of)	MM Docket No. 99-153
)	
READING BROADCASTING, INC.)	File No. BRCT-940407KF
)	
For Renewal of License of)	
Station WTVE(TV), Channel 51)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS)	File No. BPCT-940630KG
CORPORATION)	
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 51, Reading, Pennsylvania)	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Administrative Law Judge
Richard L. Sippel

ENFORCEMENT BUREAU'S COMMENTS ON MOTION TO DISMISS
ADAMS' APPLICATION, OR ALTERNATIVELY, TO ENLARGE ISSUES
(ABUSE OF PROCESS)

1. On November 2, 1999, Reading Broadcasting, Inc. ("RBI") filed a motion to dismiss the application of Adams Communications Corporation ("Adams") or, alternatively, to enlarge issues. By Order, FCC 99M-75, released November 12, 1999, the date for filing responsive comments was extended to November 22, 1999. The Enforcement Bureau ("Bureau") submits the following comments.

2. Background. RBI seeks to have Adams' application dismissed. Alternatively, RBI requests that an issue be added to determine whether Adams abused the Commission's processes by filing its application for an improper purpose and by filing frivolous motions in this proceeding.

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3. RBI alleges that the principals of Adams were also the principals of Monroe Communications Corporation (“Monroe”), an entity that had filed a competing application against a television license renewal applicant and that had the same legal counsel during the litigation as Adams now has. RBI observes that, in exchange for the dismissal of its application, Monroe received a settlement payment that exceeded its expenses.¹ RBI posits that, in light of the foregoing, Adams’ principals and its lawyers were fully aware that a substantial settlement payment was a potential outcome if a competing application were filed against RBI’s renewal application for WTVE(TV). RBI then contends that the deposition testimony of Adams’ principal Howard Gilbert reflects that Adams’ principals determined that television stations that provided a home shopping format were not serving the public interest and that WTVE(TV) was the first such station they could challenge. RBI finds this rationale suspicious in light of the Commission’s (then) recent pronouncement that the home shopping format was consistent with the public interest and that stations adopting that format could, nonetheless, receive a renewal expectancy.²

4. RBI further argues that the deposition testimony of Adams’ principals Gilbert, Wayne Fickinger, and A.R. Umans, indicates that little research or time had been spent by any of them in assessing whether WTVE(TV) was serving the Reading community. RBI concludes that the foregoing raises an inference that the professed reasons for the filing of the Adams’ application lack credibility and that the real reason for the filing was

¹ See Harriscop of Chicago, Inc., FCC 92I-97, released December 24, 1992; Response of Adams Communications Corporation to “Motion to Compel Disclosure of Fee Arrangements,” filed October 26, 1999.

² See Cable TV Act of 1992 - Home Shopping Station Issues, 8 FCC Rcd 5321, 5328 (1993) (“Home Shopping R&O”).

the possibility of obtaining a lucrative settlement. RBI also finds “curious” that, according to Adams’ principal Umans, the Adams principals have never met as a group to discuss the management of the station or develop an operating plan for the station in the event Adams’ application was granted. RBI concludes that the totality of the circumstances suggests that Adams’ application was filed for speculative purposes.³

5. RBI also argues that Adams has abused the Commission’s processes by filing “patently meritless claims” for the purposes of preventing or delaying RBI’s discovery, harassment and character assassination. In this regard, RBI submits that Adams falsely claimed that RBI’s counsel had a conflict of interest, a claim that was later withdrawn when Adams learned that its principal, Milton Podolsky, did not hold the interest he was believed to have held. RBI notes that, as a result of Adams’ claim, the depositions of three Adams’ principals need to be rescheduled. RBI also contends that several of Adams’ motions to enlarge and its claim that RBI has an unusually poor broadcast record were unsupported. In each instance, according to RBI, the position taken by Adams was contrary to established Commission policy, without any legal support for varying from that policy. RBI contends that Adams’ motions have imposed heavy and unnecessary costs and require Adams’ disqualification.⁴ RBI submits that the foregoing reflects a

³ RBI also believes that the Adams and Monroe attorney fee agreements provide further evidence of Adams’ speculative intent. However, RBI notes that, in accordance with a Memorandum Opinion and Order, FCC 99M-71, released November 1, 1999, it cannot place those documents in the public record.

⁴ RBI also charges that Adams violated the Commission’s *ex parte* rules by submitting to the presiding Administrative Law Judge a declaration from an Adams’ principal in connection with its response to RBI’s “Motion to Compel Disclosure of Fee Arrangement.” However, the available facts are insufficient to indicate whether the declaration is a prohibited presentation and, even if so, whether it is exempt from the *ex parte* prohibitions pursuant Section 1.1204(a)(1) of the Commission’s Rules. In this

pattern of abusive conduct, which calls for dismissal of Adams' application or addition of an abuse of process issue.⁵

6. Discussion. A motion to enlarge the issues must be based on specific allegations of fact. Folkways Broadcasting Co., 33 FCC 2d 806, 811 (Rev. Bd. 1972). Those allegations must raise a substantial and material question of fact. *See* Armando Garcia, 3 FCC Rcd 1065 (Rev. Bd. 1988); Section 1.229 of the Commission's Rules. As explained herein, RBI's arguably raises such questions. Thus, absent an adequate rebuttal from Adams, addition of an issue is appropriate.

7. Abuse of process is a broad concept that includes use of a Commission process to achieve a result that the process was not intended to achieve or use of that process to subvert the purpose the process was intended to achieve. *See* Broadcast Renewal Applicants, 3 FCC Rcd 5179, 5199 n. 2 (1988). In this regard, the Commission has determined that an abuse of process would include the filing of an application for the primary purpose of achieving a settlement, contrary to Section 311 of the Communications Act of 1934, as amended, 47 U.S.C. § 311. *See* WWOR-TV, Inc., 7 FCC Rcd 636 (1992), *aff'd sub nom. Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386 (D.C. Cir. 1993). In that case, like the instant matter, key participants in the challenging applicant had received substantial sums for the dismissal of an earlier filed application shortly before filing the application at issue. Moreover, in concluding

regard, the Bureau notes that Section 1.325(a)(3) of the Commission's Rules provides that in resolving a dispute involving the production of documents, such as the Adams and Monroe fee agreements, the "presiding officer may direct that the materials objected to be presented to him for *in camera* inspection."

⁵ RBI also requests that, if an abuse of process issue is added, that it be tried and decided before the comparative renewal issues are tried.

that an issue should be added, the Commission found significant that the challenger may not have had time to monitor the renewal applicant's programming before determining that the needs of the community were not being met. WWOR-TV, Inc., 6 FCC Rcd 1524, 1525-26 n. 8 (1991). In the instant case, the available evidence also suggests that Adams made little or no effort to assess the quality of WTVE(TV)'s service to the Reading community prior to its challenge.⁶ Rather, evidence adduced to date indicates that the decision to challenge the WTVE(TV) renewal arose shortly after the Adams' principals, in their capacity as principals of Monroe, had received settlement proceeds from the Chicago challenge. Absent a detailed and documented explanation from Adams regarding the circumstances surrounding its decision to challenge the WTVE(TV) renewal application, which explanation evidences a *bona fide* desire to operate channel 51 in Reading, addition of an abuse of process issue would appear appropriate.⁷

8. With respect to RBI's second point, the Bureau is not persuaded at this juncture that the allegedly "meritless" pleadings filed by Adams warrant addition of an issue. In the Radio Carrollton⁸ case cited by RBI, a five-part test was established to determine whether a petition to deny had been filed for an improper or obstructive

⁶ In this regard, the reason cited by Adams' principal Gilbert for the challenge – WTVE(TV)'s home shopping format – appears questionable in light of the Home Shopping R&O.

⁷ In this regard, the Bureau is aware that, at the time Adams filed its application, the Commission's rules precluded a settlement whereby the challenger would receive money in excess of its legitimate and prudent expenses. *See* Section 73.3523 of the Commission's Rules. At the same time, the Bureau notes that, subsequent to the promulgation of that rule, settlements have indeed been allowed without regard to whether the amount to be paid to the dismissing challenger exceeded that applicant's expenses. *E.g.*, EZ Communications, Inc., 12 FCC Rcd 3307 (1997).

⁸ 69 FCC 2d 1139 (1978) (subsequent history omitted).

purpose: 1) statements by principals or officers admitting an improper purpose; 2) the withholding of information relevant to a determination of the issue raised; 3) the absence of any reasonable basis for the petition's adverse allegations; 4) an economic motivation indicating an improper purpose; and 5) other conduct of the petitioner.⁹ Application of this test indicates that RBI has not raised a substantial question regarding Adams' conduct. In this regard, RBI cannot point to any admission by an Adams principal indicating that any of the cited pleadings or any combination thereof were filed for an improper purpose. Moreover, it is unclear whether any relevant information has been withheld. In particular, it appears that when Adams clearly understood what the relationship was between its principal Podolsky and RBI's counsel, Adams withdrew its request that Holland and Knight withdraw as RBI's counsel. As to the third factor, the Bureau would concur that no reasonable basis existed for the Adams October 18, 1999, motion to enlarge that was based on alleged misrepresentations by RBI principal, Micheal Parker, in his personal bankruptcy proceeding. However, that being said and notwithstanding our opposition to all but one of the issues sought in Adams' motions to enlarge, the Bureau is loathe to characterize Adams' other cited motions as patently frivolous. In this regard, Adams has demonstrated repeatedly that RBI and its president, Parker, do not have an unblemished record of compliance with the Commission's rules and policies.¹⁰ Regarding the fourth factor, it is possible to infer the existence of an

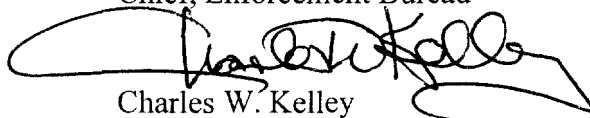
⁹ *Id.* at 1150-52. *See also*, Dubuque T.V. Limited Partnership, 4 FCC Rcd 1999, 2000 (1989).

¹⁰ *See, e.g.*, Religious Broadcasting Network, 3 FCC Rcd 4085, 4090 (Rev. Bd. 1988) and Mt. Baker Broadcasting Co., Inc., 3 FCC Rcd 4777 (1988), and the description of those cases provided by RBI.


improper economic motivation for the Adams' motions to enlarge. At the same time, however, it is also possible to infer that Adams' pleadings are nothing more than the result of vigorous advocacy. There is simply too little information available for the Bureau to believe that one inference is more likely than the other. Finally, at this stage, RBI can point to no other conduct by Adams, which will shed light on the ultimate question.¹¹ In sum, RBI has not raised a substantial question that the pleadings filed by Adams justify addition of an abuse of process issue.

9. Accordingly, the Bureau opposes RBI's motion insofar as it seeks dismissal of Adams' application or an abuse of process issue relative to motions to enlarge filed by Adams. However, with respect to the question raised about the *bona fides* of Adams' application, the Bureau believes addition of an appropriate issue is warranted, absent an adequate explanation from Adams as to the reasons for the filing of its application.

Respectfully submitted,
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November 22, 1999

¹¹ Whether or not Adams filed its application for an improper purpose is a matter that Adams may successfully address in responding to the instant motion filed by RBI.

CERTIFICATE OF SERVICE

Karen Richardson, secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 22nd day of November, 1999, sent by first class United States mail (or by hand) copies of the foregoing "Enforcement Bureau's Comments on Motion to Dismiss Adams' Application, or, alternatively, Motion to Enlarge (Abuse of Process)" to:

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